(9) (9)

Nos. 88-429 and 88-494

Supreme Court, U.S.
FILED
MAR 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC CITIZEN, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

WASHINGTON LEGAL FOUNDATION, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL APPELLEE

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QUESTIONS PRESENTED

In rendering advice to the President, the Attorney General has for more than 35 years regularly sought and received confidental recommendations regarding potential nominees for the federal bench from the American Bar Association Standing Committee on Federal Judiciary (ABA Committee). The Federal Advisory Committee Act (FACA) regulates the operation of advisory committees that are "established or utilized" by the President or Executive Branch officers. The questions presented by these appeals are:

1. Whether appellants have standing to sue the Department of Justice for injunctive relief and to seek a declaratory judgment that the FACA applies in its entirety to the ABA Committee.

2. Whether the FACA applies to the process by which the President obtains advice from the ABA Committee regarding the selection of nominees for the federal bench.

3. Whether application of the FACA to that process unconstitutionally interferes with the President's prerogative under Article II to nominate officers of the United States.

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OPINION BELOW

The opinion of the district court (88-429 J.S. App. 1a-27a (hereafter cited as J.S. App.)) is reported at 691 F. Supp. 483.

JURISDICTION

The judgment of the district court (J.S. App. 28a) was entered on August 4, 1988. A notice of appeal to this Court was filed in No. 88-494 on August 26, 1988 (88-494 J.S. App. 1a-2a), and in No. 88-429 on September 1, 1988 (J.S. App. 29a). The jurisdictional statement in No. 88-429 was docketed on September 9, 1988, and the jurisdictional statement in No. 88-494 was docketed on September 22, 1988. The Court noted

probable jurisdiction over both appeals on December 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in an appendix to this brief.

STATEMENT

A. The Process For Selecting Judicial Nominees[1]

The President is responsible for nominating the Justices of the Supreme Court and the judges of the lower federal courts. In deciding on such nominations, the President relies on advice from a federal judicial selection committee composed of several senior officials at the White House and the Department of Justice.[2] As part of the process of advising the President and at the direction of this committee, for the past 36 years the Justice Department has confidentially provided the names of potential nominees for federal judgeships to the ABA Standing Committee on Federal Judiciary (ABA Committee) to obtain the Committee's confidential evaluation of their qualifications.

The ABA Committee is a private entity consisting of 15 members drawn from the approximately 328,000 members of the American Bar Association, which is also a private organization. J.S. App. 4a. The ABA Committee receives no federal funds. *Id.* at 5a. At the Justice Department's request, a potential judicial nominee completes a questionnaire designed by the ABA Committee and submits it to the Assistant Attorney General for the Office of Legal Policy, to the Chair of the ABA Committee, and to the Committee member who represents the

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[1] It is our understanding that, while there may be some minor changes in practice, President Bush will continue the basic nomination process described in this section of our brief.

[2] This committee consists of the Attorney General; the Counsel, Deputy Counsel, and Associate Counsel to the President; two Presidential Assistants; the Director of Presidential Personnel; the Deputy Attorney General; the Counselor to the Attorney General; and the Assistant Attorney General and Deputy Assistant Attorney General for the Office of Legal Policy. J.S. App. 5a.

relevant federal judicial circuit.[3] *Id.* at 5a-6a. Using the answers to this questionnaire, a committee member (ordinarily, the ABA Committee circuit representative) examines the candidate's legal writings and interviews a representative sample of lawyers, judges, and law professors in the candidate's community, as well as members of professional organizations and other groups interested in the nomination process. J.A. 18; J.S. App. 6a; *American Bar Association Standing Committee on Federal Judiciary: What It Is And How It Works* 6 (1983), *reprinted at* J.A. 43-52. During this process, the candidate meets with one or more members of the ABA Committee. The details of this investigation are kept confidential. J.S. App. 6a & n.20. See generally *Washington Legal Foundation* v. *American Bar Association*, 648 F. Supp. 1353, 1354-1355 (D.D.C. 1986), appeal pending, No. 87-7022 (D.C. Cir.) (*WLF I*).

After that investigative process is completed, the ABA Committee representative prepares for the Chair an informal written report, which includes a summary of the candidate's background, a summary of all interviews (including the interview held with the candidate), an evaluation of the candidate's qualifications, and one of four recommendated ratings: "exceptionally well qualified," "well qualified," "qualified," or "not qualified." J.A. 46, 48; see *WLF I*, 648 F. Supp. at 1355. The Chair then provides the Justice Department with an informal evaluation of the candidate, and passes along the substance of the report with a tentative rating, both of which are confidential. *Ibid.*; J.A. 48; J.S. App. 6a. If the Justice Department so requests, a formal report on the candidate is prepared, and the full ABA Committee is polled on the candidate's rating. The Chair then confidentially reports the Committee's final rating to the Justice Department and indicates whether it is unanimous. J.A. 48-49. On some occasions, Justice Department officials discuss with the ABA Committee the initial evaluation and

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[3] The history of the American Bar Association, its Standing Committee on Federal Judiciary, and the role of both in selection of federal judges are described in J. Grossman, *Lawyers and Judges* 49-81 (1965).

rating. See J.A. 22; *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess., Pt. 3, at 272-275, 290-315 (1984) (hereafter *Confirmation Hearings*). The reasons for the final rating are sometimes revealed to the Justice Department, although the ABA Committee's sources and internal report are not. J.S. App. 6a & n.20; J.A. 48.[4]

The Attorney General considers the ABA Committee rating, along with other information,[5] in advising the President on selection of judicial nominees. J.A. 20-21; J.S. App. 7a. The Attorney General "serves as a conduit for * * * evaluations [such as that of the ABA Committee] to the President," J.A. 21, and he provides the President with the ABA Committee rating when recommending a candidate for nomination to the federal bench. *Id.* at 22. The President retains complete discretion over whether to nominate any particular candidate. *Id.* at 21. Although Presidents have often decided not to nominate a person who received an unqualified rating from the ABA Committee, in numerous instances the President has nominated such individuals. See *Confirmation Hearings* 322; J. Grossman, *Lawyers and Judges*, 73, 78, 144-153 (1965).

The ABA Committee began its confidential relationship with the Attorney General in 1952, and every President since then has substantially followed the procedure described here. Segal, *Federal Judicial Selection—Progress and the Promise of the Future*, 46 Mass. L.Q. 138, 139-145 (1961); J. Grossman, *supra*, at 69-81.[6] The President has not always adhered to this process when deciding on nominations to this Court, but on several

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[4] If the candidate is subsequently nominated, the ABA Committee rating is publicly disclosed during the Senate confirmation hearings. J.S. App. 7a.

[5] While the ABA Committee investigation is proceeding, a separate investigation of a potential nominee is conducted by the FBI. Information on potential candidates is also gathered through other Justice Department sources. J. Grossman, *supra*, at 92.

[6] For a time, the ABA Committee was furnished the names of several candidates that the President was considering for a particular nomination. Segal, *supra*, 46 Mass. L.Q. at 143.

occasions the President has also sought and received the ABA Committee's evaluation on those potential nominees as well. Segal, *supra*, 46 Mass. L.Q. at 143; J. Grossman, *supra*, at 72; J.A. 49-50; 88-429 Response of Appellee WLF to Appellant Public Citizen's Jurisdictional Statement 4.

B. The Federal Advisory Committee Act

"[G]roups created to provide advice and support to our Federal Government have existed since the days of President Washington's Administration." House Comm. on Government Operations, The Role and Effectiveness of Federal Advisory Committees, H.R. Rep. No. 1731, 91st Cong., 2d Sess. 4 (1970), reprinted in Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess., *Federal Advisory Committee Act—Sourcebook: Legislative History, Texts, and Other Documents* 217 (Comm. Print 1978) (hereafter *FACA Sourcebook*). Although the practice dates back to the beginning of the Republic, the use of non-governmental experts to advise the President on matters of public policy has blossomed in this century. T. Wolanin, *Presidential Advisory Commissions* 5-6, 205-215 (1975). In 1972, Congress decided to regulate these groups and passed the Federal Advisory Committee Act, 5 U.S.C. App. 1 *et seq.* (1982 & Supp. IV 1986) (the FACA), which governs the activities of advisory committees "established or utilized" by Congress, by the President, or by executive agencies. 5 U.S.C. App. 3(2).

For advisory committees established or utilized by the Executive Branch, the FACA requires that timely notice of all committee meetings be given, that meetings be open to the public, and that interested persons be allowed to attend and appear before, or to file statements with, the committee. 5 U.S.C. App. 10(a). Advisory committees must keep detailed minutes of their meetings, and (subject to the exemptions in the Freedom of Information Act (FOIA), 5 U.S.C. 552) must make available, for public inspection and copying, all transcripts of their meetings, as well as all records prepared by or made available to them. 5 U.S.C. App. 10(b) and (c). Any federal agency to which

a committee renders advice must also provide the public with the same access to those documents. *Ibid.* Each advisory committee must have a designated federal officer or employee to attend or chair each meeting. That official has the sole power to call or adjourn meetings, and to approve the agenda in advance. No meetings may be held in the absence of that official. 5 U.S.C. App. 10(e) and (f). Each advisory committee also must have a charter on public file. 5 U.S.C. App. 9(c). Committees "establish[ed]" by legislation or "creat[ed]" by the Executive Branch must be "fairly balanced in terms of the points of view represented and the functions to be performed." 5 U.S.C. App. 5(b)(2), (c). The President must report to Congress on his reasons for action or inaction on the public recommendations of a Presidential advisory committee. 5 U.S.C. App. 6(b). Finally, any advisory committee in existence when the FACA became effective was required to terminate within two years of that date. 5 U.S.C. App. 14(a).

As originally enacted, the FACA provided that the President or head of the responsible federal agency could close an advisory committee meeting to the public on the basis of the exemptions in the FOIA, including the exemption protecting the deliberative process, 5 U.S.C. 552(b)(5). 5 U.S.C. App. 10(d) (Supp. IV 1974). See *Aviation Consumer Action Project* v. *Washburn*, 535 F.2d 101, 106-108 (D.C. Cir. 1976). In 1976, however, when it passed the Government in the Sunshine Act, 5 U.S.C. 552b, Congress deleted the deliberative process exemption as a ground for closing a committee meeting to the public and amended the FACA so that advisory committee meetings can now be closed only on the basis of the more limited exemptions contained in the Sunshine Act. 5 U.S.C. App. 10(d); S. Conf. Rep. No. 1178, 94th Cong., 2d Sess. 25-26 (1976). The disclosure of advisory committee records remains subject to the FOIA exemptions. 5 U.S.C. App. 10(b).[7]

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[7] At least one court, however, has held that the FOIA exemption for deliberative process material is not available to protect against disclosure of advisory committee records. *Wolfe* v. *Weinberger*, 403 F. Supp. 238, 242-243 (D.D.C. 1975).

Since 1974, the Attorney General has formally taken the position that the ABA Committee is not governed by the FACA. Accordingly, neither the Department of Justice nor the ABA Committee has followed the Act's requirements in connection with the process of advising the President on potential nominees for the federal branch.

C. The Litigation Below

In December 1985, appellant Washington Legal Foundation (WLF) filed an action in the United States District Court for the District of Columbia against appellee American Bar Association, the ABA Committee, and various private individuals, alleging that the ABA Committee is covered by the FACA and must comply with its mandates. The district court dismissed that suit, ruling that the FACA does not supply private persons with a cause of action against a private entity not established or financed by the federal government. *WLF I*, 648 F. Supp. at 1359-1361.

Shortly before that dismissal, appellant WLF brought this action in the same court against appellee Department of Justice, and appellant Public Citizen subsequently intervened. Both parties asserted that the FACA governs the ABA Committee and that the court should order the Department to comply with the FACA when it seeks the Committee's advice. J.A. 11, 26. Appellant WLF also sought access to the records of the ABA Committee from the Justice Department. *Id.* at 11. The Justice Department argued that (1) the FACA does not apply to the ABA Committee, and (2) if it did, the Act would unconstitutionally interfere with the President's ability to obtain the advice necessary to decide whether to nominate an individual to the federal bench.[8]

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[8] Both before and after the district court entered judgment, the Department of Justice informed Congress of the two arguments the Department intended to present in the case.

The district court dismissed the action. J.S. App. 27a, 28a. On the first question, the court agreed with appellants that the ABA Committee is an "advisory committee" under the FACA and therefore is subject to its requirements. *Id.* at 7a-14a. The court ruled that the FACA's definition of an "advisory committee" includes the ABA Committee, because it is "utilized" by the Department through institutional arrangements as a preferred source of advice. The legislative history of the Act, the court said, shows that its text should be given an expansive construction. *Id.* at 7a-9a.

On the second question, the court agreed with the Department of Justice that application of the FACA to the ABA Committee would unconstitutionally interfere with the President's ability to obtain advice about whether to nominate a person for the federal bench. J.S. App. 15a-26a. The court determined that Article II vests in the President the authority to nominate officers of the United States, and that FACA intruded on the President's textually assigned nomination power. J.S. App. 15a-26a. The proper role for the Legislative Branch in this process, a role also set out in Article II, is the advise and consent function entrusted to the Senate. J.S. App. 16a-19a. Finding that the "hallmark of the ABA Committee's relationship with DOJ and its evaluation process is confidentiality," *id.* at 21a, the court held that the FACA was likely to disrupt significantly the selection of judicial nominees. *Id.* at 20a-25a. At the same time, the court held that the purpose of the FACA—assuring public accountability—is already served by the Senate confirmation process. *Id.* at 25-26a. On the basis of this analysis of the proper interests and concerns of the legislative and executive branches, the court concluded that application of the FACA to the President's nomination of federal judges violates separation of powers principles. *Id.* at 26a-27a.[9]

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[9] Appellee American Bar Association intervened in this case after the district court entered judgment. J.A. 3.

SUMMARY OF ARGUMENT

1. For two reasons, this case is considerably narrower than appellants contend. First, standing to bring this action exists only with regard to the denial of WLF's requests for access to the ABA Committee's records and meetings. Only as to those claims has either appellant alleged the personal injury in fact that is a prerequisite to suit. In all other respects, appellants have, at best, no more than a generalized complaint shared by all members of the public that the law, as they understand it, is not being enforced.

Second, many provisions of the FACA are inapplicable to the functioning of the ABA Committee. Since the Committee is not one "established" by the federal government but, at most, is one "utilized" by the President for certain limited purposes, none of the provisions directed only to the first of these categories is properly in issue here.

2. As a matter of statutory construction, the FACA is wholly inapplicable to the President's reliance on the ABA Committee because he does not "utilize" the services of that Committee within the meaning of the Act. Although the dictionary definition of that term might be broad enough to encompass the work of the Committee, the Act must be construed in the light of the specific objectives of Congress and in a manner that will, if reasonably possible, avoid substantial constitutional problems. So read, the Act should be held not to apply to the President's reliance on private organizations for advice in the exercise of his Article II prerogative to nominate officers of the United States.

The two fundamental purposes of the FACA, as shown by both its text and its history, are (a) to eliminate the inefficient use of federal funds resulting from the proliferation of advisory committees, and (b) to minimize the risk that special interest groups will exercise undue influence on the implementation of legislative policy. Neither of these purposes is relevant to the work of the ABA Committee, and indeed the legislative history is devoid of any congressional concern either with the work of

that Committee or with *any* resort to private persons or groups in connection with the nomination process. Such matters are not, and were not thought to be, appropriate for legislative oversight.

Under these circumstances, the FACA should be read to avoid a constitutionally suspect outcome; when the President, without expenditure of public funds, relies on a private group for advice with respect to the exercise of a power expressly and exclusively vested in him by Article II, he has not "utilized" the services of that group under the FACA. Such reliance would include resort to private groups for advice with respect to the exercise of the nomination, pardon, and veto powers—all clearly distinguishable from resort to private groups for advice with respect to the implementation of legislative policy.

3. If the FACA were to apply to the President's reliance on the advice of the ABA Committee, the Act would unconstitutionally interfere with the exercise of his power under Article II to nominate officers of the United States. Both the words and the actions of the Framers and the early leaders of the Republic leave no doubt that the nomination function was vested in the sole discretion of the President. Only such undivided authority could assure undivided responsibility for the quality and integrity of those nominated for high office. The exclusive check on that authority—the means by which the President's choice is to be subject to public scrutiny and review—is the power of the Senate to advise and consent.

Since the beginning of the Republic, Presidents have found the advice of private citizens and groups to be an essential aspect of the nomination process, and have consistently stressed the need for confidentiality in that process. Application of the FACA to the President's efforts to obtain the best and most reliable counsel could substantially reduce the value of that advice, and indeed could wholly dry up sources of assistance essential to proper performance of the President's role. To the extent that such considerations are relevant, no countervailing public or congressional interest warrants this intrusion into an exclusive function of the President.

ARGUMENT

I. THE ONLY PROVISIONS OF THE FACA AT ISSUE IN THIS CASE ARE THOSE SECTIONS REQUIRING THE GOVERNMENT TO PROVIDE THE PUBLIC WITH ACCESS TO THE RECORDS AND MEETINGS OF ADVISORY COMMITTEES

In the district court, appellants sought broad declaratory and injunctive relief against the Department of Justice, forbidding the Department from obtaining the ABA Committee's advice in the judicial nomination process until the Department satisfied all the requirements of the FACA. J.A. 11, 26. In fact, however, this case involves far less than appellants contend, for two reasons. First, the only claims appellants have standing to assert are claims of access to the ABA Committee's records and meetings. Second, by their own terms, certain provisions of the FACA do not apply to an advisory group that, like the ABA Committee, is not created by the executive.

A. Appellants Have Standing Only To Request Access To The ABA Committee's Records And Meetings

To establish standing under Article III, a plaintiff must allege a personal injury that is fairly traceable to the defendant's allegedly unlawful conduct and that is likely to be redressed by the relief sought. *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The alleged injury must be "distinct and palpable," *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979), and must give rise to a personal stake in the outcome of a case; it is not sufficient merely to state a "generalized grievance[] about the conduct of government or the allocation of power in the Federal System." *United States* v. *Richardson*, 418 U.S. 166, 173 (1974). A party must establish standing to sue with respect to each claim that he asserts; the standing to raise one claim does not by itself entitle a plaintiff to seek redress for others.

Hillsborough County v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 722 (1985); *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

Both appellants lack standing to challenge the Department's alleged noncompliance with most of the FACA's requirements. Appellant WLF can raise only two limited claims – the denial of access to the records of the ABA Committee, and WLF's inability to attend and to appear at meetings of the ABA Committee.[10] As to all other provisions of the FACA, appellants cannot show the "distinct and palpable" personal injury necessary for standing and can assert nothing more than a generalized and abstract grievance.[11]

In its complaint, appellant WLF generally alleged that it "has suffered and continues to suffer a legal wrong or is adverely affected and aggrieved by the defendant DOJ's utilization of the ABA Committee as an advisory committee in violation of FACA," J.A. 9. WLF also claimed that the ABA Committee has consulted with "selected liberal political organizations or their representatives," *id.* at 7, that the ABA Committee "has investigated and continues to investigate the judicial candidate's political and ideological philosophy in cooperation with [such] groups," *ibid.*, that the Committee's investigations "have been conducted and are continuing to be conducted in such a way as to penalize or discredit candidates who hold or profess conservative principles or ideology, and to delay or prevent their

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[10] Because in our view appellant WLF has standing to seek access to the ABA Committee's records and meetings, we believe it is unnecessary to decide whether Public Citizen independently has standing to raise those same claims. See *General Bldg. Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375, 402-403 n.22 (1982). We doubt that it does have such standing, however, even under a generous reading of its complaint.

[11] The government did not move in district court to dismiss the other claims raised by appellants because the district court had ruled in the earlier lawsuit that appellant WLF had standing to raise those claims. *WLF I*, 648 F. Supp. at 1357-1358.

nomination by the President," *ibid.*, and that if the Committee's advice "indicates that the candidate is not considered qualified to be a judge by the ABA Committee or is otherwise viewed as unfavorable, the DOJ relies on that advice by removing the candidate's name from further consideration." *Ibid.* In essence, therefore, WLF alleged that the ABA Committee pursued its advisory function in a manner that harmed potential judicial nominees with conservative views. WLF's specific claims of injury to itself, however, were considerably more narrow.

WLF alleged that it "seeks to attend and observe these meetings [of the Committee]," and that "the ABA Committee has failed and continues to fail to furnish the [WLF] and public with notice of its meetings and to open them to the [WLF] and public." J.A. 9-10. WLF also alleged that it had "requested information from the ABA Committee" and that its request "was denied." *Id.* at 6, 10-11. See *id.* at 13-19 (correspondence between WLF and the ABA Committee). Three types of information were sought: (a) "the names of all those federal judicial candidates being reviewed by the Committee," *id.* at 8; *id.* at 14 ("the names of persons whom [*sic*] your committee has been informed are under consideration for federal judicial appointments," and "the list of all names currently under review by your committee, and all future such lists"); (b) "the reports and minutes of all meetings of the Committee held during the last two years where judicial candidates were discussed and considered," as well as information about "the date and place of all future meetings," *id.* at 8, 14, 15; and (c) "any and all reports, memoranda, or other documents relating to the Committee's evaluation of Professor Lino Graglia," *id.* at 8, 16. Finally, WLF alleged that "[n]o advisory committee charter for the ABA Committee has been filed," *id.* at 10, but WLF did not claim any particular injury from that alleged irregularity.

The complaint in intervention filed by appellant Public Citizen is even more sparse. It alleged only that, J.A. 26:

> Public Citizen wishes to gain access to more information regarding the ABA Committee, including the role assigned to the Committee by the Justice Department and the

> general criteria and procedures used by the Committee in evaluating possible judicial nominees, but such information is not currently available to Public Citizen because the Justice Department is not complying with the FACA.

The accompanying affidavit submitted by the president of Public Citizen, J.A. 28-30, added nothing to Public Citizen's claim of injury. It stated only that the organization sought to intervene in this case because acceptance of the government's argument that the FACA cannot constitutionally be applied to the ABA Committee "would have a serious, detrimental impact on the public's right of access to, and input into, the operation of federal advisory committees." *Id.* at 30. The affidavit also stated that Public Citizen has a "significant interest in the federal judiciary," because it "regularly resorts to the federal courts to further the interests of its members," and "[t]hus, the criteria and methods used to select federal judges have far-reaching effects on Public Citizen's work." *Ibid.*

Thus, while appellants' complaints assert that the Department of Justice has not complied with any of the requirements of the FACA, appellant WLF alleged only two injuries personal to it: a denial of access to the records and minutes of the ABA Committee, and a denial of access to the Committee's meetings. We believe those allegations are sufficient to establish appellant WLF's standing to raise those claims. But neither appellant has standing to complain that the Department of Justice and the ABA Committee have not followed any other requirements of that law. Thus, appellants lack standing to assert, for example, that the ABA Committee does not have a balanced membership or a charter, that it meets outside the presence of a federal official or without an agenda approved by him in advance, and that the ABA Committee was not terminated within two years of the effective date of the FACA. Similarly, appellants cannot challenge the President's failure to report to Congress if he does not follow the ABA Committee's recommendations.[12]

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[12] Two district court decisions appear to have ruled that a plaintiff can establish standing to assert a claim under the balanced membership and other provisions of FACA Section 5 simply by establishing standing to raise a claim

Appellants' other claims—such as WLF's claim that the ABA Committee is biased against conservative nominees, or Public Citizen's claim that it is interested in the members of the federal bench—do not state any injury to either appellant that could not also be alleged by any other member of the public. Appellants have not alleged that any member of their organizations would have been nominated for the federal bench had the ABA Committee not been rendering confidential advice to the President. Appellants cannot allege that they have any greater stake in the operation or outcome of the nomination process than any other individual citizen or organization. And appellants' claim that the government has violated the FACA does not, without more, establish their standing to seek relief directing the Department to comply with the Act's requirements in their entirety. *Allen* v. *Wright*, 468 U.S. at 754-755 (collecting cases); *Ex parte Levitt*, 302 U.S. 633 (1937); *Mulqueeny* v. *National Commission on the Observance of International Women's Year, 1975*, 549 F.2d 1115, 1122 (7th Cir. 1977) (applying that principle to a suit brought under the FACA).[13] Lacking any true injury,

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under the records access and open meetings provisions of FACA Section 10. *WLF I*, 648 F. Supp. at 1357-1358; *National Anti-Hunger Coalition* v. *Executive Committee of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 527 (D.D.C. 1983), aff'd on other grounds, 711 F.2d 1071 (D.C. Cir. 1983). The District of Columbia Circuit has indicated in dicta that it agrees with that view. *National Anti-Hunger Coalition*, 711 F.2d at 1073-1074 & n.2. That conclusion, in our view, is wrong. A plaintiff must independently establish his standing to assert each claim set forth in his complaint. *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. at 722; *Warth* v. *Seldin*, 422 U.S. at 498.

An additional difficulty with the balanced membership provision of FACA Section 5 is that it establishes no clear standard for a reviewing court to use to assess whether a particular advisory committee is balanced. See Note, *The Federal Advisory Committee Act*, 10 Harv. J. Legis. 217, 229 (1973). This requirement, therefore may not be judicially enforceable under the Administrative Procedure Act, 5 U.S.C. 551. See *Heckler* v. *Chaney*, 470 U.S. 821, 833 (1985).

[13] Even if they could show a special interest in the appointment process, appellants would likely lack standing to challenge aspects of the process, since

appellants' broadly stated claims seek to have this Court act as a "publicly funded forum[] for the ventilation of public grievances," *Valley Forge*, 454 U.S. at 473. See also *Sierra Club* v. *Morton*, 405 U.S. 727, 739-740 (1972) (despite Sierra Club's longstanding "commitment to the cause" at issue, Club lacked standing to object to development program because of failure to allege sufficient injury in fact).[14]

B. Provisions Of The FACA Governing The "Establish[ment]" Of An Advisory Committee Are Not Applicable To The President's Reliance On The Advice Of A Private Entity Like The ABA Committee

Although the FACA is generally applicable to advisory committees "established or utilized" by the President or an executive

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the Senate must consent to the President's nominees before they can become judges. See *Allen* v. *Wright*, 468 U.S. at 757-761, and *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-43 (1976) (no standing where alleged injury depends on the actions of an independent third party).

[14] The importance of closely scrutinizing the claims of injury set forth in appellants' complaint is underscored by the fact that unlike the FOIA, 5 U.S.C. 552(a)(4)(B), and the Sunshine Act, 5 U.S.C. 552b(h), the FACA does not supply private parties with a private right of action to enforce that Act's mandates. That omission was no oversight. Several earlier versions of the legislation ultimately enacted as the FACA contained provisions that would have created a private cause of action, but none of those provisions was adopted by Congress in the statute. See S. Rep. No. 1098, 92d Cong., 2d Sess. 16 (1972); S. 2064, § 14, 117 Cong. Rec. 19,805 (June 15, 1971); S. 1637, § 11, 117 Cong. Rec. 11,444 (Apr. 22, 1971); *FACA Sourcebook* at 135, 150. And in 1977 Congress declined to amend the FACA to add a private right of action. See 123 Cong. Rec. 22,802 (July 13, 1977); *FACA Sourcebook* at 370-371 (reprinting text of proposed bill). See *Mulqueeny*, 549 F.2d at 1120 n.15 ("the legislative history of * * * the [FACA does not] manifest[] an intent, either express or implied, to create a right of enforcement in private citizens."). Accordingly, if appellants have any remedy in this case, it can be based only on the APA and would require a clear showing of injury in fact. *Mulqueeny*, 549 F.2d at 1120-1122.

branch agency, 5 U.S.C. App. 3(2), several of its provisions apply only to advisory committees that are "established," rather than "utilized," by the government. For example, Section 5(b) states that "legislation establishing, or authorizing the establishment of any advisory committee" shall "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. 5(b)(2). The Executive Branch must also follow that requirement "in creating an advisory committee." 5 U.S.C. App. 5(c). The FACA also requires that particular notice and justification be given before the head of a federal agency establishes an advisory committee. 5 U.S.C. App. 9(a). See also 5 U.S.C. App. 8(b) (an agency officer shall exercise control over the procedures and accomplishments of committees "established by that agency").

Those requirements are not applicable in this case. The ABA Committee is a purely private organization that was in existence long before it came to be used by the President for advice in the nomination process. *WLF I*, 648 F. Supp. at 1354-1355; J.S. App. 18a; J.A. 21; J. Grossman, *supra*, at 62-69. Thus, it cannot be deemed to have been "established" or "created" by the government in any sense of those terms.[15] Indeed, the district court noted that "there is no contention here that the ABA Committee was established by the President or a federal agency," J.S. App. 8a, and appellants make no such claim in this Court. See Public Citizen Br. 16 ("the ABA Committee was not 'established' by the Justice Department"); WLF Br. 13 ("the ABA Committee constitutes an advisory committee under the [FACA] because it is utilized by the Department of Justice").

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[15] See *Physicians' Education Network, Inc.* v. *HEW*, 653 F.2d 621, 622 (D.C. Cir. 1981) (the balanced membership requirement is inapplicable to a committee that is not established by statute or pursuant to statutory authority); *Metcalf* v. *National Petroluem Council*, 553 F.2d 176, 178 (D.C. Cir. 1977) (specifying the ways that an advisory committee can be "established"); *Consumers Union of United States, Inc.* v. *HEW*, 409 F. Supp. 473, 477 n.6 (D.D.C. 1976), aff'd, 551 F.2d 466 (D.C. Cir. 1977); *Lombardo* v. *Handler*, 397 F. Supp. 792, 796-797 (D.D.C. 1975), aff'd mem., 546 F.2d 1043 (D.C. Cir. 1976) (Table), cert. denied, 431 U.S. 932 (1977).

Because, as the district court explained, the FACA can apply to the ABA Committee (if at all) only because it is "utilized" by the President, J.S. App. 8a, the FACA requirements that pertain only to advisory committees "establish[ed]" or "creat[ed]" by the executive are not before the Court at this stage of the case.[16]

II. THE FACA DOES NOT APPLY TO THE PRESIDENT'S RELIANCE ON PRIVATE ORGANIZATIONS FOR ADVICE IN THE EXERCISE OF HIS ARTICLE II PREROGATIVE TO NOMINATE "OFFICERS OF THE UNITED STATES"[17]

A. The Dictionary Meanings Of the Term "Utilized" In The FACA Do Not Furnish The Answer To This Case

Appellants' parallel arguments that the FACA applies to the ABA Committee proceed in four steps. See WLF Br. 15-26; Public Citizen Br. 15-22. First, appellants point out that Section 3(2) of the FACA defines an "advisory committee" as "any committee" that is "utilized by the President" or "by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." 5 U.S.C. App. 3(2). Second, they contend that the ABA Committee is a "committee" for purposes of the Act. Third, appellants submit that, since Congress did not define the term "utilize" in the FACA, that term should be given its dictionary meaning of "to make use of." J.S. App. 8a. Because the President and Department of Justice "make use of" the ABA Committee's evaluation of a candidate for the federal bench, the Committee is said to be an "advisory committee" under the FACA. Finally, appellants contend that this conclusion is consistent with the implementing regulations adopted by the General Services Administration, which define an "advisory

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[16] As explained below, however, that requirement might come into play if the FACA were held to apply to the ABA Committee, and the government thereafter terminated and then revived its reliance on the Committee.

[17] If the Court agrees with our argument in Point I, the question in Point II is limited to the applicability of the records access and open meeting provisions of the FACA.

committee" as a committee that the Executive Branch adopts "as a preferred source" of advice, 41 C.F.R. 101-6.1003 (1987), and with the committee reports on the FACA, which state that the "advisory committee" should be interpreted broadly, S. Rep. No. 1098, 92d Cong., 2d Sess. 6, 8 (1972); H.R. Rep. No. 1017, 92d Cong., 2d Sess. 4 (1972).

We agree that the FACA's definition of an "advisory committees" is broadly worded. But it is precisely that breadth that has troubled the lower courts, which have recognized that a sweeping, literalistic application of its terms could have a stifling effect on the ability of the executive to conduct its affairs, and could therefore raise serious structural and even constitutional problems.[18] The principal difficulty is two-fold. First, the entities covered by the term "advisory committee"—*i.e.*, "any committee, board, commission, council conference, panel, task force, or other similar group," 5 U.S.C. App. 3(2)—could embrace virtually any formal group (and perhaps some informal ones as well) of two or more persons. Second, the verbs "established" and "utilized" are written in the disjunctive and are not expressly defined. The verb "established" can generally be understood from other provisions in the FACA to refer to committees that the government has itself brought into being. See 5 U.S.C. App. 5(b) (referring to "*legislation* establishing, or authorizing the establishment of any advisory committee") (emphasis added) and 5(c) (referring to advisory committees "*creat[ed]*" by the executive). But the Act does not supply a

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[18] As the court observed in *National Anti-Hunger Coalition* v. *Executive Committee*, 557 F. Supp. 524, 530 (D.D.C.), aff'd, 711 F.2d 1071 (D.C. Cir. 1983), the FACA is "obscure, imprecise, and open to interpretations so broad that * * * it would threaten to impinge unduly upon the prerogatives preserved by the separation of powers doctrine." See also *Nader* v. *Baroody*, 396 F. Supp. 1231, 1232 (D.D.C. 1975) ("the Act contains a very broad, imprecise definition, and in this respect is not a model of draftsmanship"), vacated as moot, No. 75-1969 (D.C. Cir. Jan. 10, 1977). See *NRDC* v. *Herrington*, 637 F. Supp. 116, 118-121 (D.D.C. 1986); *Center for Auto Safety* v. *Tiemann*, 414 F. Supp. 215, 223 (D.D.C. 1976), aff'd in part, rev'd in part, and remanded, 580 F.2d 689 (D.C. Cir. 1978); *Lombardo* v. *Handler*, 397 F. Supp. 792, 800 (D.D.C. 1975), aff'd, 546 F.2d 1043 (D.C. Cir. 1976), cert. denied, 431 U.S. 932 (1977).

similar limiting principle to guide the interpretation of the verb "utilized," and simply to give that term its dictionary meaning of "make use of" would invest it with an astonishing reach.

This case illustrates the dramatic effect on the operation of the government that would result from treating the President's reliance on the ABA Committee's evaluation of a potential nominee's qualifications as the "utilization" of an advisory committee. If applicable to the ABA Committee, the FACA would have a significant and pervasive impact on the way that the ABA Committee supplies the President with advice. First, it appears that the ABA Committee must "terminate" immediately, or at least the President's use of it must terminate, since all advisory committees existing when the FACA was enacted in 1972 were required to cease operating within two years. 5 U.S.C. App. 14(a). The ABA Committee's role could be renewed by the President or the Attorney General, but only pursuant to the procedures set out in the Act, and if this action constituted an "establish[ment]," the Committee might then be subject to such provisions as the "fairly balanced" membership requirement of 5 U.S.C. App. 5(b)(2). See 5 U.S.C. App. 5(c).

Even though the ABA Committee is a private organization, it would be required to have a charter, 5 U.S.C. App. 9(c), and a federal official to control and supervise its operations, 5 U.S.C. App. 8(b). That official must chair or at least attend each meeting of the ABA Committee, and would have the power to call, approve, and adjourn any and all such meetings. 5 U.S.C. App. 10(e) and (f). Moreover, the ABA Committee would need to keep minutes of its meetings, all of which would be open to the public, unless the President or the Attorney General determined in writing that the meetings could be closed pursuant to specified exemptions in the Sunshine Act. 5 U.S.C. App. 10(a) and (d). The minutes and all records of the ABA Committee would be open to public inspection and copying unless the FOIA exemptions applied to specific material. 5 U.S.C. App. 10(b). If the ABA Committee's recommendations to the President are public, the President would then have to submit reports to Congress explaining why he had disregarded the ABA Com-

mittee's advice regarding particular candidates for the bench. 5 U.S.C. App. 6(b). In sum, the FACA would completely alter the face and operation of the ABA Committee, and place it under the direct control and supervision of the Attorney General. Even if the President were willing to operate on this basis, it seems highly unlikely that the ABA Committee would accept such constraints. See ABA Br. Point III. B. 2.

Moreover, if applied literally, the FACA could be read to regulate the President's ability to consult with a legion of other groups that are interested in the nomination process. For example, giving the term "utilized" its dictionary meaning would require compliance when the President consults with organized labor groups, such as the AFL-CIO, before nominating a Secretary of Labor, when the President consults with civil rights organizations, such as the NAACP, before nominating Commissioners of the EEOC, and perhaps even when the President consults with his own national political party before nominating other officers of the federal government.

This case, therefore, cannot properly be disposed of by resort to the dictionary. The term "utilized" may be simple and straightforward, but so is the phrase "sleeping in the railway station is prohibited" in a local ordinance. Just as a court may legitimately inquire whether a passenger who falls asleep while waiting for his train has committed a misdemeanor within the meaning of that phrase,[19] so too a court may inquire whether the President "utilizes" an advisory committee within the meaning of the FACA when he seeks the opinion of a wholly private organization about the qualifications of a person before deciding whether to nominate that person for federal office. The reason is that in both cases the dictionary meaning of the terms "yields results so manifestly unreasonable that they could not fairly be attributed to [legislative] design," *United States* v. *Rutherford*, 442 U.S. 544, 555 (1979).

The "plain-meaning" rule invoked by appellants is "rather an axiom of experience than a rule of law, and does not preclude

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[19] The example is taken from Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 664 (1958).

consideration of persuasive evidence if it exists." *Boston Sand Co.* v. *United States*, 278 U.S. 41, 48 (1928) (Holmes, J.). This Court has stated on a number of occasions that the circumstances of the enactment of a particular law may show that Congress did not intend that words of common meaning would have their literal effect. See, *e.g.*, *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 432 (1986); *Watt* v. *Alaska*, 451 U.S. 259, 267-273 (1981). For instance, in *O'Connor* v. *United States*, 479 U.S. 27 (1986), this Court held that a treaty exempting Panama Canal Commission employees from "*any* taxes • • • on income received as a result of their work for the Commission" did not exempt them from federal income taxation.[20] Such an approach is particularly appropriate in this case, where a literalistic construction of the statute would raise serious constitutional questions that can be avoided by reading the Act in a manner that is not "clearly contrary to the intent of Congress." *DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988). See also, *e.g.*, *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 499-501 (1979); *United States* v. *Security Indus. Bank*, 459 U.S. 70, 73 (1982).

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[20] There are many other examples. See, *e.g.*, *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (the term "employees of motor carriers," as used in the Motor Carrier Act, refers only to employees in safety-related jobs and not to all employees; "even when the plain meaning did not produce absurd results but merely an unreasonable one • • • this Court has followed [the legislative] purpose, rather than the literal words"); *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272 (1987) (holding that a statute providing that pregnant women "shall be treated the *same* [as other persons] for all employment-related purposes," 42 U.S.C. 2000e(k) (emphasis added), does not forbid special leave and reinstatement allowances); *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 848 (1975) (refusing to treat "stock" in a cooperative housing project as a "security" for purposes of the Securities Act of 1933 and the Securities Exchange Act of 1934, even though both statutes' definitions of "security" include the term "stock"); *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 109 S.Ct. 278, 281-282 (1988) (provision of federal statute that made "State taxation laws" inapplicable to the outer Continental Shelf does not prevent a State from including income earned from sale of outer shelf oil and gas in its apportionment formula). See generally *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. at 284 ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.") (citations and internal quotation marks omitted).

B. The Term "Utilized" Should Be Construed In Light Of The Purposes and Policies Of The FACA

In our view, the term "utilized" should be read in light of the two fundamental purposes of the FACA: (1) to eliminate the inefficient use of federal funds that resulted from underwriting the work of advisory committees whose reports were of little value to federal policymakers, and (2) to minimize the risk that special interest groups would influence or direct the implementation of congressional policy in a manner at odds with the public interest. See, *e.g.*, S. Rep. No. 1098, *supra*, at 1, 3, 4-5, 16; H.R. Rep. No. 1017, *supra*, at 6, 8, 10; *NRDC* v. *Herrington*, 637 F. Supp. 116, 120 (D.D.C. 1986); *Consumers Union of United States, Inc.* v. *HEW*, 409 F. Supp. 473, 475 (D.D.C. 1976), aff'd, 551 F.2d 466 (D.C. Cir. 1977). Those objectives are reflected on the face of the statute itself. 5 U.S.C. App. 2(b). Accordingly, two important criteria for determining whether a particular body is "utilized" for purposes of the FACA are whether the entity receives federal funds and whether the use being made of the body relates to the exercise of statutory authority delegated by Congress to implement federal law.

1. The FACA was the culmination of 15 years of intermittent effort by Congress to regulate the government's use of "advisory committees," *i.e.*, bodies consisting in whole or in part of private persons enlisted by the government to provide information, technical expertise, or collective advice and recommendations on issues of public policy.[21] Although the practice of cre-

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[21] In 1950, concern that the creation of federal advisory committees could foster anticompetitive conduct by industry leaders, H.R. Rep. No. 576, 85th Cong., 1st Sess. 3 (1957); *FACA Sourcebook* 3-4, 46; Note, *The Federal Advisory Committee Act*, 10 Harv. J. Legis. 217, 220 (1973), led the Justice Department to issue guidelines governing the operation of those committees. See *WOC's [Without Compensation Government Employees] and Government Advisory Groups, Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 84th Cong., 1st Sess. Pt. 1, at 586-587 (1955) (reprinting guidelines). The guidelines resembled several of the requirements later imposed by the FACA, see Note, *supra*, 10 Harv. J. Legis. at 220 n.18, and specifically sought to minimize the risk of antitrust violations by ensuring

ating and using executive advisory committees existed for our entire history, over time that practice was sharply criticized on

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that advisory committees were established only at the government's initiative and that the government would supervise their operation.

In 1957, after the House Committee on Government Operations found that the Department's guidelines were often ignored, see Note, *supra*, 10 Harv. J. Legis. at 220, Representative Fascell sponsored a bill that would have incorporated the Department's guidelines into law. H.R. 7390, 85th Cong., 1st Sess. (1957). The bill would have required agencies to report to Congress about their use of advisory committees, and advisory committees to follow guidelines like those issued by the Justice Department, see H.R. Rep. No. 576, *supra*, at 2, 5-7 (describing the provisions of the bill), but would not have imposed any requirements on wholly private organizations whose advice was sought by the executive. See 103 Cong. Rec. 11,252 (1957) (remarks of Rep. Fascell and Rep. Vorys).

The bill was not enacted, but two years later, the Bureau of the Budget issued a directive on advisory committees that essentially incorporated its guidelines. Perritt & Wilkinson, *Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years*, 63 Geo. L.J. 725, 731 (1975); Note, *supra*, 10 Harv. J. Legis. at 221. In 1962, President Kennedy issued an executive order, Exec. Order No. 11,007, 3 C.F.R. 573 (1959-1963 Comp.), 27 Fed. Reg. 1875 (1962); *FACA Sourcebook* 238-241, providing new regulations for the formation and use of an advisory committee, other than a Presidential advisory committee, that was "formed" by an executive department or agency, or that was "not formed by a department or agency, but only during any period when it is being utilized by a department or agency in the same manner as a Government-formed advisory committee." Exec. Order No. 11,007, § 2(a). The purpose of the order was to ensure that advisory committees were used in compliance with the antitrust and conflict of interest laws, *id.* para. 3, and to that end, the order distinguished between general advisory committees and industry advisory committees, imposing stricter standards on the latter. The order provided that in the case of a nonindustry advisory committee, an agency could waive many of the order's provisions if it determined that compliance "would interfere with the proper functioning of such a committee or would be impracticable, that adequate provisions are otherwise made to insure that committee operation is subject to Government control and purpose, and that waiver of the requirement is in the public interest." *Id.* § 6(f).

Congress returned to this subject in the early 1970s when the House and Senate Government Operations Committees held hearings on advisory committees. See Perritt & Wilkinson, *supra*, 63 Geo. L.J. at 733; Note, *supra*, 10 Harv. J. Legis. at 222-224. As a result of the hearings, Congress determined that statutory regulation of advisory committees was necessary for the reasons explained in the text.

several grounds.[22] Those criticisms and the failure of the executive to police this practice itself ultimately persuaded Congress that congressional regulation of advisory committees was necesssary, for three reasons.

First, Congress found that, although the number of advisory committees had greatly proliferated, the committees were often inefficient, or a complete waste of federal funds.[23] Many committee reports and recommendations received little if any consideration by the President, his staff, or other executive officials,[24] and numerous committees had been created to undertake assignments already completed by a predecessor.[25] In addition, many such committees were created simply because of the inclination, whenever a problem or emergency arose, "to create a commission to study and advise on the problem," and then to use the committee's existence as an excuse to delay resolving it.[26]

Second, Congress became concerned with a phenomenon colloquially known as "agency capture," *i.e.*, the risk that special interest groups who work closely, and behind closed doors, with regulatory agencies will be able to exert an improper influence over the implementation of congressional policy by those agen-

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[22] See generally S. Rep. No. 1098, *supra*, at 1, 3, 4-5, 16; H.R. Rep. No. 1017, *supra*, at 6, 8, 10; House Comm. on Government Operations, The Role and Effectiveness of Federal Advisory Committees, H.R. Rep. No. 1731, 91st Cong., 2d Sess. 1-23 (1970); *FACA Sourcebook* 214-237; H.R. Rep. No. 576, *supra*, at 1-5; *FACA Sourcebook* 44-48; Perritt & Wilkinson, *supra*, 63 Geo. L.J. at 731-734; Note, *supra*, 10 Harv. J. Legis. at 219.

[23] A 1970 Report by the House Committee on Government Operations estimated that there were between 2600 and 3200 interagency and advisory committees, with thousands of committee members and assigned staff personnel, and an annual cost of as much as $75 million. H.R. Rep. No. 1731, *supra*, at 14-15; *FACA Sourcebook* 227-228. Indeed, the Report found that "[t]here are, even, committees to advise advisory committees." H.R. Rep. No. 1731, *supra*, at 5; *FACA Sourcebook* 218. See also S. Rep. No. 1098, *supra*, at 3; *id.* at 5-6.

[24] See, *e.g.*, H.R. Rep. No. 1731, *supra*, at 12; *FACA Sourcebook* 225.

[25] See H.R. Rep. No. 1731, *supra*, at 13; *FACA Sourcebook* 226.

[26] *Id.* at 5; *FACA Sourcebook* 218.

cies.[27] As the House Report on the bill that ultimately became the FACA explained, "[o]ne of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns." H.R. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972). The Senate Report on the FACA made the same point, stating that "[t]he lack of public scrutiny of the activities of advisory committees was found to pose the danger that subjective influences not in the public interest could be exerted on the Federal decisionmakers." S. Rep. No. 1098, 92d Cong., 2d Sess. 6 (1972).

Finally, Congress concluded that the 1962 executive order issued by President Kennedy (see page 24 note 21, *supra*) had been ineffective, for several reasons. The order did not apply to Presidential advisory committees; it left the responsibility for managing advisory committees to individual departments and agencies; it contained no provisions relating to the funding of such committees; and it authorized a waiver of its requirements whenever a waiver was deemed to be in the public interest. Moreover, many departments and agencies had no established procedure for enforcing the executive order. H.R. Rep. No. 1731, 91st Cong., 2d Sess. 9 (1970). Indeed, the executive could not even provide Congress with a complete list of advisory committees, or their total cost to the government. H.R. Rep. No. 1017, *supra*, at 7-8; H.R. Rep. No. 1731, *supra*, at 10-11, 14-15. In sum, "[a]t best, [the 1962] Executive Order • • • p.ovides minimum basic management control over only a small portion of the advisory committee mechanism." H.R. Rep. No. 1731, *supra*, at 9.

The provisions of the FACA were designed to achieve their objectives without unduly limiting the executive's ability to rely on the assistance of advisory committees. To ensure that advisory committees do not waste the public's funds, Section 5 directs congressional committees to oversee the advisory committees under their jurisdiction in order to determine whether

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[27] See generally Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975).

they should be abolished, revised, or redirected, and whether an existing committee can do the work of a newly-proposed committee. Section 5 also requires the executive to follow those guidelines, to the extent they are applicable, when creating an advisory committee. Section 6 requires the President to report to Congress annually on the operation of Presidential advisory committees, and to report, within one year of the submission of the public report of such a committee, on his actions or reasons for inaction on the committee's report. Moreover, Section 9(a) provides that an advisory committee shall not be established unless authorized by law or by the President, or unless the head of the responsible agency, after consulting with the Administrator of General Services, formally finds that establishing a committee is in the public interest. To ensure that advisory committees do not improperly or unduly influence the implementation of federal law, Sections 5, 9, 10, and 11 impose various requirements on the composition and operation of advisory committees, such as the balanced membership requirement for committees established or created by government, the records access and open meetings requirements, and the requirement that a federal officer call, attend, and control the agenda of each committee meeting. Finally, to ensure that advisory committees are effectively supervised and managed, Sections 7 and 8 require the Administrator of General Services and the heads of the responsible federal agencies annually to review the need for and effectiveness of advisory committees and to adopt management controls for their operation.

2. This history confirms that the FACA was Congress's response to two particular criticisms of advisory committees, and that Congress had in mind two noncontroversial purposes: (1) controlling the ever-increasing expenditure of federal funds on inefficient and duplicative advisory committees, and (2) counteracting the tendency of various interest groups to exert undue influence on federal agencies having regulatory or policy authority over matters directly involving those interests. Neither purpose is relevant to the President's reliance on the ABA Committee. The Committee does not make use of any federal funds, and it is not in any way concerned with the implementation of

legislative policy by an executive agency. Instead, the ABA Committee is concerned with advising the President on the exercise of his prerogative under Article II to nominate federal judges.

Moreover, the structure of the FACA reveals that it was not designed to regulate this activity. Such specific requirements as termination after a committee has finished its task or in any event within two years of its creation, the presence of a federal officer at all committee meetings, federal control of the committee's agenda, and reporting to Congress on committee recommendations not adopted by the President, are a sensible regulation of the operation of advisory committees that receive federal funds or that influence the implementation of congressional policy. But they are wholly inapt with respect to a group that imposes no cost on the public fisc and that advises the President on his exercise of a power vested solely in him by the Constitution.

Given the history and structure of the FACA, it may be appropriate to give the terms "committee" and "advice" the broad reading that appellants suggest, in order to ensure that federal funds are not misspent and that congressional policy is properly implemented. But there is no call for giving the term "utilized" the broad, dictionary reading that appellants espouse, because there is no indication in the history or structure of the Act that Congress intended the term to place a significant and highly questionable limitation on the President's ability to rely on private counsel. Indeed, that term appeared in neither the House nor the Senate bill. The House bill limited the definition of an advisory committee to a committee "established" by statute, the President, or an agency. H.R. 4383, 92d Cong., 2d Sess. § 3(2) (1972), reprinted at *FACA Sourcebook* 301. The Senate bill defined an "agency advisory committee" as an entity "established or organized" under a statute or by the President or a federal officer. S. 3529, 92d Cong., 2d Sess. § 3(1) (1972), reprinted at *FACA Sourcebook* 175. The term "utilized" was added to the FACA by the Conference Committee, which did not specify its meaning. H.R. Conf. Rep. No. 1403, 92d Cong., 2d Sess. 2, 9 (1972). Under these circumstances, there is no

reason to conclude that the term "utilize" encompasses the President's reliance on private organizations, like the ABA Committee, in situations wholly beyond the scope of Congress's concerns.

3. The limiting construction we propose is buttressed by the need to avoid the serious constitutional problems that would arise from applying the FACA in the circumstances of this case. As explained in Point III below, the nomination power belongs to the President alone, and this centralization of authority serves vital purposes in our constitutional system. The FACA therefore should not be read to govern confidential advice of the kind sought and received by the President from the ABA Committee unless and until Congress has clearly stated its intent to accomplish that constitutionally suspect result.

In analogous circumstances, this Court has read statutes to avoid difficult constitutional questions. For instance, in *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948), the Court found an implied exception from a broadly worded statutory provision authorizing judicial review of administrative orders concerning overseas and foreign air transportation routes. Because judicial review might have led to serious interference with the President's authority over foreign affairs, the Court declined to give the statute its literal meaning in the absence of evidence that "Congress foresaw or intended the consequences." *Id.* at 110.[28] Here, because there is

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[28] There are many other examples of this Court's insistence on a clear statement of congressional purpose in areas raising significant questions of the allocation of authority among branches of the federal government, or between the federal government and the states. See, *e.g.*, *Webster* v. *Doe*, 108 S. Ct. 2047, 2053 (1988) (declining, absent a clearly expressed legislative intent, to read a statute as precluding review of a constitutional claim against the Director of Central Intelligence – in part to avoid "the 'serious constitutional question' that would arise" if the act were so read); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) ("[w]e ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command"); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967) ("only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review");

similarly no clear expression of Congress's intent to bring about a constitutionally questionable result, the text of the FACA should not be read to create such a problem.[29]

Application of this principle is also appropriate in this case for two additional reasons. First, when the FACA was passed, the Senate must have been aware, through its role in the confirmation process, of the well-known practice of relying on the ABA Committee for confidential advice on judicial nominations. Cf. J.S. App. 18a-19a. Indeed, the ABA Committee was by 1972 probably one of the best known committees providing advice to the executive. Yet, to our knowledge there is not the slightest expression in the FACA or in its extensive legislative history of an intent to include within the reach of the Act any advice sought by the President in connection with the nomination of federal judges.[30]

Second, imputing to Congress the intent to regulate the nomination process through the FACA would be particularly inappropriate, since Congress in 1978 expressly recognized the constitutional limitations on its own power in this area. As a condition of the creation of new federal district judgeships in the Omnibus Judgeships Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629, Congress provided that the Act would take effect upon the President's promulgation of standards and guidelines for merit selection of nominees for the new judgeships. Both the

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Atascadero State Hospital v. *Scanlon*, 473 U.S. 234, 243 (1985) (courts should not conclude that Congress has abrogated a State's Eleventh Amendment immunity unless Congress has "express[ed] its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself").

[29] Cf. *Nader* v. *Baroody*, 396 F. Supp. at 1234 (in holding that the FACA does not apply to informal contacts between the White House and private groups, the court said: "Nowhere is there an indication that Congress intended to intrude upon the day-to-day functioning of the presidency").

[30] A congressional committee is presently examining the role that the ABA Committee plays in the appointment process. Legal Times, Feb. 20, 1989, at 5.

terms of the Act and its legislative history show that, because of the Article II limitations on Congress's powers, the provision was regarded only as precatory. Section 7(b) of the Omnibus Judgeship Act of 1978 provided that the President could waive any such standards, and Section 7(c) provided that "no nomination or appointment to a United States district court judgeship may be invalidated on the basis of the President's failure to comply with this section or with any standards or guidelines promulgated under this section." 92 Stat. 1633. As the House Judiciary Committee report explained with regard to the merit provisions of the proposed bill (which was enacted in a slightly revised form): "Under article II of the Constitution, the President is given the power to nominate, and by and with the consent of the Senate, to appoint Federal judges authorized by the Congress. [The merit provision] is not an attempt to circumvent, limit or interfere with the exercise of that authority." H.R. Rep. No. 858, 95th Cong., 2d Sess. 6-7 (1978).

The interpretation of the FACA that we propose here does not purport to resolve all the difficult questions that may arise; any such effort would be premature and inappropriate. But we submit that there is a clear distinction between those groups that lie at the very core of the Act's objectives and those that lie beyond its reasonable and intended scope. In the former category are committees that operate at public expense and committees that advise federal officials with the responsibility for implementing legislative policy. In the later category are groups, like the ABA Committee, that advise the President concerning a power expressly and exclusively vested in him by the Constitution and not subject to legislative restriction.[31] Only if Congress has made clear its intent to control such a power should this Court reach the difficult constitutional questions that such a law would present.

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[31] Other comparable powers include the veto and pardon powers.

III. APPLYING THE FACA TO THE PROCESS BY WHICH THE PRESIDENT OBTAINS ADVICE NECESSARY TO NOMINATE JUDGES TO THE FEDERAL BENCH WOULD UNCONSTITUTIONALLY INTERFERE WITH THE PRESIDENT'S ARTICLE II NOMINATION POWER[12]

A. The Power To Nominate The "Officers Of The United States" Is A Prerogative Of The President

The Appointments Clause, Art. II, § 2, Cl. 2, expressly provides that "*The President* * * * *shall nominate*, and by and with the Advice and Consent of the Senate, shall appoint Ambassasors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law" (emphasis added). This Clause is not merely a matter of "etiquette or protocol," but plays a "substantive" role in the separation of powers. *Buckley* v. *Valeo*, 424 U.S. 1, 125, 126 (1976). The sole limitation on the President's power is found in the Incompatibility Clause, Art. I, § 6, Cl. 2, which, in relevant part, states only that "[n]o Senator or Representative shall, during the time for which he was elected, be appointed to any civil Office under the Authority of

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[12] If the Court accepts our standing argument in Point I, but rejects our statutory argument in Point II, the case could be remanded to the district court to determine whether, in light of the FACA's exceptions to the open meetings and records access requirements, see 5 U.S.C. App. 10(b) and (d), appellants are entitled to any of the materials they have requested, or to attend any of the Committee's meetings.

We note, however, that a remand on the records access and open meeting issues may have serious ramifications. Under the FACA, the ABA Committee meetings are not automatically closed simply because they fall within the Sunshine Act exceptions. The Committee's meetings would be closed only if the President or the Attorney General determines that they may be closed and so states in writing with his reasons. 5 U.S.C. App. 10(d). Even if that authority exists, the ABA Committee may be unwilling to participate in a system under which the government will control access to the Committee's materials and meetings. If so, the option of closing the Committee's meetings and withholding its materials would not eliminate the injury to the President resulting from application of the FACA to the ABA Committee.

the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time." The constitutional text itself therefore recognizes that the power to nominate the "Officers of the United States" belongs to the President and to him alone. Cf. *Schick* v. *Reed*, 419 U.S. 256, 266 (1974) (so describing the Pardon Power of Art. II, § 2, Cl. 1).

The Framers underscored the point in their words and actions. Alexander Hamilton explained in *The Federalist* No. 76, at 456-457 (C. Rossiter ed. 1961), that "[i]n the act of nomination, [the President's] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as complete as if he were to make the final appointment."[33] Hamilton also concluded that "[it] will be the office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*. There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice he may have made." *Id.* No. 66, at 405.[34] Other Framers and early members of the new federal government, including George

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[33] *The Federalist* is a particularly valuable source of the intent of the Framers and the meaning of the Constitution. See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821).

[34] Hamilton also explained why the President would have this "sole duty": "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them." *The Federalist* No. 76, at 455-456.

Washington,[35] James Wilson,[36] and Thomas Jefferson,[37] also emphasized, both before and after the Constitution was adopted, that the nomination power belongs to the President alone. And Jefferson, like Hamilton before him, stressed the value of this sole prerogative in assuring that "responsibility weighs with its heaviest force on a single head."[38]

Appellants maintain that the debates in the Constitutional Convention on the adoption of the Appointments Clause reveal the Framers' belief that Congress would have the authority to regulate the President's exercise of his nomination power. WLF Br. 29-32; Public Citizen Br. 28-30. In fact, the lesson to be drawn from the debates on the Appointments Clause is exactly the opposite, since the Framers rejected proposals that would have vested the nomination authority elsewhere. See *Buckley* v.

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[35] President Washington frostily responded to criticism from then-Senator James Monroe regarding a possible appointment for Hamilton by stating that "I *alone* am responsible for a proper nomination." L. White, *The Federalists: A Study in Administrative History* 85 (1948). President Washington also noted in his diary that James Madison agreed with Thomas Jefferson and John Jay that the powers of the Senate extend "no farther than to an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution." J. Harris, *The Advice and Consent of the Senate* 40 (1953).

[36] James Wilson explained to the Pennsylvania ratifying convention: "The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality; *no appointment can take place without his nomination;* and he is responsible for every nomination he makes." 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (1836) (emphasis added) (hereafter cited as *Elliot's Debates*).

[37] As Secretary of State, Thomas Jefferson noted that "[t]he Constitution itself * * * gives the *nomination* of the foreign Agent to the President, the *appointment* to him and the Senate jointly, the *commissioning* to the President." Opinion by Secretary of State Thomas Jefferson on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), quoted at 4 P. Kurland & R. Lerner, *The Founders' Constitution* 109 (1987).

[38] *Id.* at 36. Congress too has recognized that the nomination power belongs solely to the President. H.R. Rep. No. 858, *supra*, at 6-7, quoted at page 31, *supra*.

Valeo, 424 U.S. at 129-131; ABA Br. Point III. A. (both describing the evolution of the Appointments Clause).

Appellants also rely on the fact that the Senate must confirm the President's nominees and on Congress's power to create "inferior Courts," Art. I, § 8; Art. III, § 1, as authority to regulate the President's appointment power. WLF Br. 29-36; Public Citizen Br. 31. Neither principle, however, provides a legitimate basis for Congress to interfere with the President's Article II nomination authority. The Senate's role in the confirmation process is expressly defined and circumscribed by the text of Article II to the limited power to confirm or disapprove the President's nominees.[39] In addition, although this Court has held that in some circumstances Congress may qualify the President's authority to *remove* an official who exercises executive power,[40] no decision of the Court suggests that Congress may interfere with the President's power to *nominate* a person for federal office. In fact, because Article II precisely limits both the role that the Legislative Branch plays in the appointment process and the Chamber that is to fill that role, interference with the President's clearly defined function would threaten the scheme that the Framers established. Cf. *Buckley* v. *Valeo*, 424 U.S. at

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[39] The Framers also made that point. James Iredell described to the North Carolina Ratifying Convention the precise limits of the powers of Congress regarding appointments: "As to offices, the Senate has no other influence but a restraint on improper appointments." *Quoted at* P. Kurland & R. Lerner, *The Founders' Constitution* 102 (1987). James Madison said in the debate in the First Congress on the President's removal authority: "If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with greater caution, it is that which relates to officers * * *. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. *This done, the Legislative power ceases.* They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it." 1 *Annals of Cong.* 581-582 (J. Gales ed. 1789) (emphasis added).

[40] See *Morrison* v. *Olson*, 108 S. Ct. 2597 (1988); *Wiener* v. *United States*, 357 U.S. 349 (1958); *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935).

126-137 (Congress cannot appoint officers who perform an executive function).[41]

Moreover, Congress's authority to create the judicial positions at issue does not mean that in doing so Congress can override the limitations placed on its power by the Appointments Clause. In *Buckley* v. *Valeo, supra*, the Court recognized that Congress has the power under Article I to regulate congressional elections and under the Necessary and Proper Clause to create offices to carry out that function. Nonetheless, the Court held, Congress cannot disregard the requirements of the Appointments Clause in exercising either power; instead, appointment of the members of the Federal Election Commission must comply with the appointment process defined in Article II. 424 U.S. at 131-135. Congress thus cannot invoke its power to create lower federal courts as a ground to regulate the President's authority to nominate the judges who will serve on those courts.[42]

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[41] Public Citizen errs in contending (Br. 30-31) that Hamilton's criticisms in *The Federalist* No. 77 of the use of appointment councils shows that the FACA may constitutionally be applied to regulate the nomination process. Hamilton criticized the practice of authorizing a council to make appointments precisely because such a practice diffuses responsibility. See *The Federalist* No. 77, at 461. The ABA Committee, of course, does no more than render its advice to the President, who alone makes a nomination and therefore bears personal responsibility for his choice.

[42] Our argument is supported by the proposition that Article III judges are Principal Officers under the Appointments Clause and therefore must be appointed by the President. This Court has never precisely defined the line between Principal and Inferior Officers, see *Morrison* v. *Olson*, 108 S. Ct. at 2608, but a practical construction of the Constitution demonstrates that judges of the "inferior courts" are not "inferior Officers" and therefore must be appointed by the President with the advice and consent of the Senate. See 2 J. Story, *Commentaries on the Constitution of the United States* § 1579, at 403 n.1; § 1599, at 415 n.1 (5th ed. 1891); E. Corwin, *The President, Office and Powers* 76 & n.28 (4th ed. 1957) ("The term [Inferior Officer] seems to suggest in this particular context officers intended to be subordinate to those in whom their appointment is vested, and at the same time to exclude the courts of law and heads of departments.").

Article III judges have none of the criteria listed in *Morrison*, 108 S. Ct. at 2608-2609, to identify the Independent Counsel as an Inferior Officer. Judges

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are not removable by a higher authority even for cause; they can only be impeached by Congress. Judges do not perform limited duties, unless that term would apply also to the Justices of this Court in the sense that Congress by law defines the jurisdiction of the federal courts. Article III judges have wide-ranging authority, not the least of which is to hold unconstitutional laws enacted by the political branches of the federal and state governments. The jurisdiction exercised by lower federal judges therefore is not limited in the same sense as that of the Independent Counsel in *Morrison*. Finally, judges do not have a limited tenure, because they "hold their Offices during good Behavior." Art. III, § 1. This last factor is a key one, since "[i]t cannot, for a moment, be admitted, that it was the intention of the constitution, that those offices which are denominated inferior offices should be held during life." *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). *Id.* at 260 ("all inferior officers appointed under [the Presidents, Heads of Departments, or Courts of Law], by authority of law, must hold their office at the discretion of the appointing power").

Admittedly, the Constitution uses the term "inferior" to denote the federal courts below this one. Art. I, § 8; Art. III, § 1. That designation means that the rulings of those courts can be reviewed by this Court, but does not mean that judges of the inferior courts are subordinate to the Justices of this Court or to any other officer. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 59 n.10 (1982) (plurality opinion) (the "guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism"). Thus, the President may not be excluded from the process of appointing circuit and district court judges.

Our argument in text, however, does not rest on that conclusion. Even if circuit and district judges were Inferior Officers and could be appointed by the Attorney General or the courts, the FACA's intrusion into the nomination power would still be invalid. The Appointments Clause gives the President the exclusive nomination authority unless Congress also surrenders the Senate's oversight power entirely by making other provision for appointments. Because Congress has not exercised that option, the first procedure in the Appointments Clause governs and divides the appointment power between the President and the Senate in the manner described.

B. The Ability To Receive Candid Advice And To Keep That Advice Confidential Is Essential If The President Is To Be Able Effectively To Exercise His Nomination Power

For 200 years, since George Washington sought advice on potential nominees for federal office, our Presidents have stressed their belief that, in order to exercise the nomination power effectively and judiciously, they must be able to receive confidential advice from a wide range of sources.[43] This belief,

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[43] President Washington sought advice on potential nominees from sources other than the Senate shortly after assuming office, R. Swanstrom, *The United States Senate, 1787-1801*, at 95 (1985), and treated the role of the Senate regarding appointments as merely a power to approve or disapprove his nominations. (The nominations were presented only by written messages, a practice that has been followed by Presidents since then. *Id.* at 96-99.) President Washington sought confidential opinions from then-Representative James Madison regarding certain individuals who had applied for judgeships. *Id.* at 101.

President Jefferson warned Treasury Secretary Albert Gallatin against disclosing letters of recommendation about possible nominees because "[r]ecommendations when honestly written should detail the bad as well as the good qualities of the person recommended. That gentlemen may do freely if they know their letter is to be confined to the president or the head of a department. But if communicated further it may bring on them troublesome quarrels. In Gl. Washington's time he resisted every effort to bring forth his recommendations." J. Harris, *supra*, at 47. For reasons of confidentiality, President Jefferson also refused to provide the Senate with papers revealing the reasons for his nominations, stating that "[m]y nominations are sometimes made on my own knowledge of the persons; sometimes on the information of others given either voluntarily or at my own request and in personal confidence. This I could not communicate without a breach of confidence, not, I am sure, under the contemplation of the committee. They are sensible the Constitution has made it my duty to nominate; and has not made it my duty to lay before them the evidence or reasons whereon my nominations are founded." N. Small, *Some Presidential Interpretations of the Presidency* 126 n.10 (1970).

President Cleveland ordered his Attorney General to refuse to provide papers to the Senate while it was considering approval of a nomination of a district attorney, noting that the withheld documents were "addressed to me or intended for my use and action purely unofficial and private, not infrequently confidential, and having reference to the performance of a duty exclusively mine." J. Richardson, 8 *Messages and Papers of the Presidents* 378 (1898). More recently, President Truman refused to make public confidential in-

and the reasons for it, were eloquently and forcefully stated by President Tyler when he refused to disclose to the House of Representatives the names of House members who had sought appointment to federal office:

> All appointments to office made by a President become from the date of their nomination to the Senate official acts, which are matter of record and are at the proper time made known to the House of Representatives and to the country. But the applications for office, or letters respecting appointments, or conversations held with individuals on such subjects, are not official proceedings, and cannot by any means be made to partake of the character of official proceedings, unless after the nomination of such person so writing or conversing . . . the President shall think proper to lay such correspondence or conversations before the Senate. • • • [I]t becomes me, in defense of the Constitution and laws of the United States, to protect the Executive department from all encroachment on its powers, rights and duties. In my judgment, a compliance with the resolution . . . would be a surrender of duties and powers which the Constitution has conferred *exclusively* on the Executive. . . . The appointing power, so far as it is bestowed on the President, is conferred without reserve or qualification. . . . I cannot perceive anywhere in the Constitution any right conferred on the House of Representatives to hear the reasons which an applicant may urge for an appointment to office under the Executive department, or any duty resting upon the House . . . by which it may become responsible for any such appointment.

A. Breckenridge, *The Executive Privilege* 40 (1974) (footnotes and citation omitted).

This longstanding belief is eminently sound. Speaking in a related context in *United States* v. *Nixon*, 418 U.S. 683, 708 (1974), this Court recognized that "[a] President and those who assist him must be free to explore alternatives in the process of

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vestigative files regarding his nomination of David Lilienthal as Chairman of the Atomic Energy Commission. J. Harris, *supra*, at 243.

shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." Thus, there is an undeniably "valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." *Id.* at 705. Indeed, "the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Ibid.* (footnote omitted). See also *Ryan* v. *Department of Justice*, 617 F.2d 781, 789-790 (D.C. Cir. 1980); *National Anti-Hunger Coalition*, 557 F. Supp. at 530.

The importance of confidentiality in the investigation of potential nominees, and in the dealings between the ABA Committee and the Executive Branch, is equally plain. As the district court pointed out, "[t]he hallmark of the ABA Committee's relationship with DOJ and its evaluation process is confidentiality." J.S. App. 21a. The ABA Committee itself believes that "[a] primary concern of the Committee in connection with its investigation of prospective nominees is confidentiality," and that "the President should be able to obtain a confidential assessment of prospective nominees as an aid in making the nomination." J.A. 18. See also *Confirmation Hearings* 320-321.

C. Application Of The FACA To The President's Reliance On The ABA Committee's Evaluations Would Unconstitutionally Interfere With The President's Ability To Exercise His Nomination Power

1. Application of the FACA to the ABA Committee would adversely affect the process by which the President selects judicial nominees in three ways. First, unless complete confidentiality could be assured, private parties might be reluctant to express to committee members controversial and unpopular views about potential judges. Second, requiring a federal official to be present at Committee meetings might deter committee members themselves from expressing their individual opinions

about potential nominees. Third, application of the FACA to the ABA Committee would subject the Committee to federal control of its operations and would leave in the hands of federal officials and ultimately the courts the determination whether the Committee's materials and meetings would be disclosed to the public. Depriving the Committee of a substantial measure of its present autonomy could lead the Committee to withdraw from the evaluation process altogether. All three prospects, or any one, would sharply curtail the President's ability effectively to select judicial nominees.

Such interference with the President's ability to make nominations is constitutionally impermissible. Allowing the President to receive advice from within and without the government, and to deliberate with his advisors on a potential nominee, is necessary for the type of thoroughgoing evaluation and exchange that is critical to an informed choice. In order for that process to work, the President must be able to assure those he consults that they may feel free to express controversial and unpopular viewpoints without the fear that their opinions will be revealed to a larger audience. Confidentiality is therefore necessary for candor, which in turn increases the quantity, value, and reliability of the information received by the President. Cf. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150-151, 152-153 (1975); *EPA* v. *Mink*, 410 U.S. 73, 87 (1973). Moreover, the attempt to limit the President's ability to receive advice from the ABA Committee exposes the constitutional problem caused by the FACA in its starkest form, since it involves both a textually committed presidential prerogative and a private organization that receives no federal funds.[44]

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[44] Contrary to appellant's WLF's suggestion (WLF Br. 36-38), it is immaterial that the ABA Committee communicates its evaluations to the Attorney General, and thus to the President, through another official at the Justice Department. The President could not decide on nominations without the assistance of "subordinates" who "act for him under his direction." *Myers* v. *United States*, 272 U.S. 52, 117 (1926). See also *The Federalist* No. 72, at 436 (A. Hamilton) (executive officers "ought to be considered as the assistants or deputies of the Chief Magistrate"); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 809 (1982) ("Members of the Cabinet are direct subordinates of the President.").

Appellants contend that the proper approach is to balance the President's need to receive confidential advice against the need to control the work of advisory committees and to obtain access to information regarding the judicial nomination process. This Court has applied a balancing approach in cases in which Congress has assigned a function ordinarily associated with one branch to another branch, or to a governmental body with a certain degree of independence. See, *e.g.*, *Mistretta* v. *United States*, 109 S. Ct. 647 (1989); *Morrison* v. *Olson*, 108 S. Ct. 2597 (1988); *CFTC* v. *Schor*, 478 U.S. 833 (1986); *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977) (*Nixon* v. *GSA*).[45] But the Court has not followed that approach when Congress has sought to interfere with the exercise of a power expressly and exclusively vested in the President by Article II. *Bowsher* v. *Synar*, 478 U.S. 714 (1986); *INS* v. *Chadha*, 462 U.S. 919 (1983); *Buckley* v. *Valeo*, *supra*; *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866). For example, in *Ex parte Garland*, *supra*, and *United States* v. *Klein*, *supra*, this Court refused to give effect to statutes interfering with the President's pardon power, which, like the nomination power, is committed solely to the President by Art. II, § 2, Cl. 1, and is unlimited in its scope. *Ex parte Garland*, 71 U.S. (4 Wall.) at 380 ("The power thus conferred is unlimited, with the exception [for "cases of impeachment"] stated. * * * This power of the President is not subject to legislative control."); *United States* v. *Klein*, 80 U.S. (13 Wall.) at 148. See generally *Schick* v. *Reed*, 419 U.S. at 266.[46]

Indeed, appellants surely do not suggest that if they prevail in this case, the result could be obviated if the President were simply to deal directly with the ABA Committee.

[45] In those instances, if the Court found a potential for disruption of the operations of a Branch, it looked to see if " 'that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.' " *Mistretta*, 109 S. Ct. at 660 n.13 (citation omitted).

[46] As the Court explained in *Schick* v. *Reed*, 419 U.S. at 266: "A fair reading of the history of the English pardoning power, from which our Art. II, § 2, cl. 1, derives, of the language of that clause itself, and of the unbroken

In the *Klein* case, the Court succinctly wrote that the law "certainly impairs the executive authority," and found little more discussion necessary. 80 U.S. (13 Wall.) at 148.

This case belongs in the latter category. The authority to nominate the officers of the United States is a prerogative of the President that can be judiciously exercised only if he can obtain confidential advice about potential nominees. Control by Congress over the President's ability to gather such information therefore intrusively regulates the manner by which the President carries out a function assigned to him alone. Moreover, the intrusion is especially objectionable with respect to the nominating function, because as Hamilton and Jefferson emphasized (pages 33-34 and note 34, *supra*), only undivided authority to nominate can justify undivided responsibility for the quality and integrity of the nominee.[47]

But if a balancing test is appropriate, the district court correctly applied it. J.S. App. 19a-26a. On the one hand, the President's need for confidential advice is obvious and unarguable, and the application of the FACA to this case will seriously disrupt the President's ability to obtain such advice. On the

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practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress."

[47] We note also that the Constitution grants to Congress certain enumerated powers, and Congress may enact legislation only pursuant to those enumerated powers. *E.g.*, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); *Oregon* v. *Mitchell*, 400 U.S. 112, 128 (1970) (opinion of Black, J.); *id.* at 154 (opinion of Harlan, J.). See also J. Madison, *Report on the Virginia Resolutions* (1798), *reprinted in* 4 *Elliott's Debates* 528; *The Federalist* No. 33, 201-203 (A. Hamilton); 2 J. Story, *Commentaries on the Constitution of the United States* § 1238 (1891). In those instances where a private committee receives no appropriated funds and where its advice is limited to the President's exercise of his specific textual powers under the Constitution, there appears to be no specific enumerated power authorizing the regulation by Congress of such a committee's manner of advising the President. And, for reasons we elaborate in the text, it would not be "necessary and proper" within the meaning of Article I, § 8, for Congress to enact legislation that so fundamentally intrudes on powers exclusively granted to the President.

other hand, the Senate has its own investigative powers in the confirmation process and does not need the FACA to carry out that task. Moreover, Senate hearings during the confirmation process supply the public with an opportunity to learn about and comment on nominees. Accordingly, if a balance must be struck, the district court properly struck it in the President's favor.[48]

2. Appellant Public Citizen contends (Br. 36-37) that the President's power is sufficiently protected because the FACA contains exemptions from its records disclosure and open meetings requirements.[49] That argument is mistaken, for two reasons.

First, the FACA contains no exemption from the requirement that a federal official call and attend every advisory committee meeting. That intrusion may well dissuade various interested organizations from participating in the nomination process, for the same reasons that a private organization would be unwilling to expose its deliberations to public scrutiny.

Second, as explained earlier (at 6), Congress amended the FACA in 1976 in order to remove the deliberative process privi-

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[48] This case is very different from *United States* v. *Nixon*. The Court held in that case that a contention of executive privilege, based on a "broad, undifferentiated claim of public interest in * * * confidentiality," 418 U.S. at 706, had to give way in the face of a subpoena that was "essential to enforcement of criminal statutes," *id.* at 707, and that was necessary to protect the "very integrity of the judicial system," *id.* at 709. The Court said that, on the one hand, "we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution," *id.* at 712, while "[o]n the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." *Ibid.* Furthermore, the material at issue was at that point only to be the subject of an in camera inspection by the district court and was not automatically to be publicly disclosed.

[49] Public Citizen minimizes (Br. 27) the effect of the FACA by labeling its mandates as procedural. Even if that were an accurate characterization, it lacks force, since here, as in many other contexts, procedure seriously intrudes into substance. See *Mistretta* v. *United States*, 109 S. Ct. at 665.

lege under the FOIA as a ground for closing advisory committee meetings. Thus, the FACA does not protect the confidentiality of the ABA Committee's advice-giving process on the very basis that is ordinarily considered necessary for that process to function effectively.[50] Although other exemptions are available, it is not clear that they are adequate to safeguard the confidentiality of this process.[51] Given the ABA Committee's great concern for the importance of confidentiality, this uncertainty regarding the application of the FOIA and Sunshine Act exemptions—as well as the fact that it is up to the executive in every instance to claim an exemption, and up to the courts to decide whether to sustain the claim—could persuade the ABA Committee to decline to supply the President with its evaluations.

For those reasons, *Nixon* v. *GSA* does not support appellants. There, the Court declined to hold that the Presidential Recordings and Materials Preservation Act of 1976, Pub. L. No. 93-526, 88 Stat. 1695, was facially unconstitutional as a violation of executive privilege. That law authorizes a member of the executive branch—the Archivist of Presidential Papers—to collect and screen presidential papers for their eventual disclosure to the public. Unlike the FACA, the law expressly protects matters covered by the executive and deliberative process privileges. §§ 104(a)(5) and (d), 88 Stat. 1697, 1698.

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[50] As noted earlier (at 6 note 7), at least one court has held that FOIA exemption 5 (for deliberative process materials) is unavailable to prevent disclosure of advisory committee records. *Wolfe*, 403 F. Supp. at 242-243.

[51] The FACA does incorporate the FOIA and Sunshine Act exemptions relating to protection of material whose release would constitute an unwarranted invasion of personal privacy, 5 U.S.C. 552(b)(6), and 552b(c)(6). Although these exemptions would arguably apply to justify withholding information about potential judicial nominees, the exemptions protect only the privacy interests of individuals and not the Executive's fundamental need for candid and confidential advice concerning qualifications and experience, regardless of the privacy implications for the persons being considered. Moreover, the application of Exemption 6 not only requires the government to identify a particular personal privacy interest that is subject to protection and that would be threatened by disclosure, but also requires the courts to balance the rights of the individual against the public interest in disclosure. See *United States Dept. of State* v. *Washington Post Co.*, 456 U.S. 595, 599-603 (1982).

Thus, the very protections that the FACA eliminates were there preserved, and this Court heavily relied on that fact in rejecting the constitutional challenge. 433 U.S. at 444. Furthermore, the law left the control and screening of Fresidential materials in the hands of the executive branch. *Id.* at 441-455.

In light of these key differences between the FACA and other statutes such as the FOIA, appellant Public Citizen incorrectly asserts (Br. 32-33) that affirming the judgment below would call into question the validity of these other statutes. As this Court has recognized, Exemptions 1 and 5 of the FOIA, which deal with classified information and the deliberative process, were designed to safeguard the powers of the executive. See *EPA* v. *Mink*, 410 U.S at 81-94. See also *Soucie* v. *David*, 448 F.2d 1067, 1080-1084 (D.C. Cir. 1971) (Wilkey, J., concurring). Moreover, neither the FOIA nor the Sunshine Act applies to the President and his immediate staff or advisors. See *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980); *Rushforth* v. *Council of Economic Advisors*, 762 F.2d 1038, 1040, 1043 (D.C. Cir. 1985) (Sunshine Act covers only meetings of agencies headed by collegial bodies).

In sum, if, contrary to our submission, the Court concludes that the FACA was intended to apply to the President's reliance on confidential advice in the circumstances here, it should hold the Act unconstitutional as so applied.[52]

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[52] If the Court agrees with our submission, it, of course, would have no occasion to consider appellee ABA's defense of the judgment below on the ground that the FACA violates the ABA's First Amendment rights. Since the question was not reached in the court below, this Court would, in any event, have discretion to remand the case for consideration of that contention initially by the lower courts. We note only that, to the extent the ABA contention rests on a claim that it has a First Amendment right to engage in a confidential relationship with the government, we disagree. An analogous claim perhaps could be made with more force with respect to possible application of the FACA to the President's reliance on the advice of groups such as his own political party, which has a protected associational relationship with him. Cf. *Eu* v. *San Francisco County Democratic Central Committee*, No. 87-1269 (Feb. 27, 1989).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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MARCH 1989

APPENDIX

1. Article II, § 2, Cl. 2, of the Constitution of the United States provides in part:

> The President * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

2. The Federal Advisory Committee Act, 5 U.S.C. App. 1-14 (1982 & Supp. IV 1986), provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Federal Advisory Committee Act".
>
> Sec. 2. (a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.
>
> (b) The Congress further finds and declares that:
>
> (1) the need for many existing advisory committees has not been adequately reviewed;
>
> (2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;
>
> (3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;
>
> (4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

Sec. 3. For the purpose of this Act –

(1) The Term "Administrator" means the Administrator of General Services.

(2) The Term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

(3) The term "agency" has the same meaning as in section 551(1) of title 5, United States Code.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

Sec. 4. (a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by

(1) the Central Intelligence Agency; or

(2) the Federal Reserve System.

(c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

Sec. 5. (a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committees are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

Sec. 6. (a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) The President shall, not later than December 31 of each calendar year (after the year in which this Act is enacted), make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding calendar year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted,

a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

Sec. 7. (a) The Administrator shall establish and maintain within the General Services Administration a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

(b) The Administrator shall, immediately after October 6, 1972, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine—

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) whether it should be merged with other advisory committees; or

(4) whether it should be abolished.

The Administrator may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Administrator's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Administrator shall carry out a similar review annually. Agency heads shall cooperate with the Administrator in making the reviews required by this subsection.

(c) The Administrator shall prescribe administrative guidelines and management controls applicable to advisory

committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Administrator shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

(d)(1) The Administrator, after study and consultation with the Director of the Office of Personnel Management, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that –

(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS-18 of the General Schedule under section 5332 of title 5, United States Code;

(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service; and

(C) such members –

(i) who are blind or deaf or who otherwise qualify as handicapped individuals (within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 794)), and

(ii) who do not otherwise qualify for assistance under section 3102 of title 5, United States Code, by reason of being an employee of an agency (within the meaning of section 3102(a)(1) of such title 5),

may be provided services pursuant to section 3102 of such title 5 while in performance of their advisory committee duties.

(2) Nothing in this subsection shall prevent –

(A) An individual who (without regard to his service with an advisory committee) is a full-time employee of the United States, or

(B) an individual who immediately before his service with an advisory committee was such an employee,

from receiving compensation at the rate at which he otherwise would be compensated (or was compensated) as a full-time employee of the United States.

(e) The Director shall include in budget recommendations a summary of the amounts he deems necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

Sec. 8. (a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Administrator under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.

(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall –

(1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers.

Sec. 9. (a) No advisory committee shall be established unless such establishment is –

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man-years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

Sec. 10. (a)(1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

(b) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of

section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

Sec. 11. (a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.

(b) As used in this section "agency proceeding" means any proceeding as defined in section 551(12) of title 5, United States Code.

Sec. 12. (a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

Sec. 13. Subject to section 552 of title 5, United States Code, the Administrator shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

Sec. 14. (a)(1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or that officer by appropriate action prior to the expiration of such two-year period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(b)(1) Upon the renewal of any advisory committee, such advisory committee shall file a charter in accordance with section 9(c).

(2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

(3) No advisory committee required under this subsection to file a charter shall take any action (other than preparation and filing of such charter) prior to the date on which such charter is filed.

(c) Any advisory committee which is renewed by the President or any officer of the Federal Government may be continued only for successive two-year periods by appropriate action taken by the President or such officer prior to the date on which such advisory committee would otherwise terminate.